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Fourth report on identification of customary international law

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I. Introduction

1. In 2012, the International Law Commission placed the topic "Formation and evidence of customary international law" on its current programme of work, and held an initial debate on the basis of a preliminary note by the Special Rapporteur.[1]

2. In 2013, the Commission held a general debate on the basis of the Special Rapporteur's first report[2] and a memorandum by the Secretariat entitled "Elements in the previous work of the International Law Commission that could be particularly relevant to the topic".[3] The Commission changed the title of the topic to "Identification of customary international law".[4]

3. In 2014, the Commission considered the Special Rapporteur's second report,[5] and confirmed its support for the "two-element" approach to the identification of customary international law. Following the debate, the 11 draft conclusions proposed in the second report were referred to the Drafting Committee, which provisionally adopted eight draft conclusions.[6]

4. A third report by the Special Rapporteur,[7] prepared for the Commission's sixty-seventh session in 2015, sought to complete the set of draft conclusions. In doing so, it addressed certain matters not covered in the second report, and others to which it was agreed the Commission would return in 2015. In particular, it analysed further the issue of the relationship between the two constituent elements; contained more detailed enquiries into inaction as a form of practice and/or evidence of acceptance as law (*opinio juris*), and the relevance of practice of international organizations; examined the role of treaties and resolutions, judicial decisions and teachings; and explored particular customary international law and the persistent objector rule.

5. The Commission debated the Special Rapporteur's third report from 13 to 21 May 2015.[8] The members of the Commission reiterated their support for the "two-element" approach; and there was general agreement that the outcome of the topic should be a set of practical conclusions with commentaries, aiming at assisting practitioners and others in the identification of rules of customary international law. It was suggested, moreover, that the draft conclusions proposed in the report would benefit from further specification, and many particular proposals were voiced in this regard.

6. Following the debate, the draft conclusions proposed in the third report were referred to the Drafting Committee, which provisionally adopted eight additional draft conclusions as well as additional paragraphs for two of the draft conclusions

[1] Document A/CN.4/653: *Note on the formation and evidence of customary international law*.
[2] A/CN.4/663.
[3] A/CN.4/659.
[4] Summary record A/CN.4/SR.3186 (25 July 2013), pp. 5-6.
[5] A/CN.4/672.
[6] See statement of the Chairman of the Drafting Committee (7 August 2014), available at http://legal.un.org/docs/?path=../ilc/sessions/66/pdfs/english/dc_chairman_statement_identification_of_custom.pdf&lang=E (the Drafting Committee was unable to consider two draft conclusions because of lack of time, and one draft conclusion was omitted).
[7] A/CN.4/682.
[8] See summary records A/CN.4/SR.3250, 3251, 3252, 3253, 3254 (13, 15, 19, 20, 21 May 2015); *Report of the International Law Commission on its Sixty-seventh session (4 May-5 June and 6 July-7 August 2015)* (A/70/10), paras. 62-107.

adopted at the previous session. On 29 July 2015, the Chairman of the Drafting Committee presented to the plenary a report on the work of the Committee on the topic at the sixty-seventh session, which contained the full set of 16 draft conclusions provisionally adopted by the Committee at the sixty-sixth and sixty seventh sessions.[9]

7. On 6 August 2015, the Commission took note of draft conclusions 1 to 16 as provisionally adopted by the Drafting Committee.[10] It was anticipated that the Commission would, at its next session, consider the adoption on first reading of the draft conclusions as well as the commentaries thereto.

8. In addition, the Commission requested the Secretariat to prepare a memorandum on the role of decisions of national courts in the case law of international courts and tribunals of a universal character for the purpose of identification of customary international law. The memorandum considers the *travaux préparatoires* of Article 38, paragraph 1, of the Statute of the International Court of Justice before proceeding to analyse the case law of various international courts and tribunals in order to deduce some general observations. These are consistent with the Commission's treatment of national court decisions in the present topic as both a form of State practice or evidence of acceptance as law (*opinio juris*), and as a subsidiary means for determining the existence or content of customary international law.[11]

9. In the Sixth Committee debate in 2015, delegations generally commended the Commission for the work accomplished on this topic thus far, and for the pragmatic approach taken. In particular, delegations reiterated their support for the general approach followed in the draft conclusions provisionally adopted by the Drafting Committee, and looked forward to a first reading of the draft conclusions by the Commission during the sixty-eighth session. Valuable comments and suggestions were made with respect to matters addressed in the draft conclusions.[12] In addition, following information from other States received previously, a detailed written statement was received from Switzerland in response to the Commission's request to States for information related to the topic.

10. The present report seeks to address, in section II, some of the main comments and suggestions that have been made by States and others in relation to the 16 draft conclusions provisionally adopted by the Drafting Committee in 2014 and 2015. It is suggested that the Commission review the draft conclusions (and accompanying commentaries) in the light of such comments before adopting the draft conclusions on first reading. In section III, the Special Rapporteur proposes some minor modifications to the texts provisionally adopted by the Drafting Committee, which

[9] A/CN.4/L.869. See also the statement of the Chairman of the Drafting Committee, available at http://legal.un.org/docs/?path=../ilc/documentation/english/statements/2015_dc_chairman_statement_cil.pdf&lang=EF.

[10] A/70/10, para. 60.

[11] A/CN.4/691: The role of decisions of national courts in the case law of international courts and tribunals of a universal character for the purpose of the determination of customary international law – memorandum by the Secretariat.

[12] The Sixth Committee discussed the report of the International Law Commission at its 17th to 25th meetings, on 2, 3, 4, 6, 9- 11 November 2015(A/C.6/70/SR.19-23). See also A/CN.4/689: Topical summary of the discussion held in the Sixth Committee of the General Assembly during its seventieth session, prepared by the Secretariat, paras. 15-27.

could be made at the present stage if the Commission so decides.[13] Section IV then concerns ways and means to make the evidence of customary international law more readily available, a matter that the Commission had of course dealt with some sixty-five years ago. The section recalls the background of that prior work, as a basis for further consideration of the matter within the Commission at present. Finally, section V contains suggestions concerning the future programme of work on the topic.

II. Suggestions by States and others on the draft conclusions provisionally adopted

11. The Special Rapporteur has consulted widely on the draft conclusions provisionally adopted by the Drafting Committee, and participated in various meetings at which they were discussed, including a meeting of the Asian-African Legal Consultative Organization (AALCO) informal expert group on customary international law held in Bangi, Malaysia in August 2015.[14] In particular, representatives in the Sixth Committee debate provided a wealth of valuable suggestions, for which the Special Rapporteur is very grateful. As indicated below, some of the points raised may be addressed in the commentaries. Others could be considered this year, at the first reading stage, and yet others may be more appropriate for consideration on second reading. The Special Rapporteur would welcome the views of members of the Commission on the following points; his own views, provided below, are for the most part tentative and, of course, subject to the debate in the Commission.

12. A question was raised with respect to the use of the term "conclusions" to describe the Commission's output on the present topic; some asked whether the term "guidelines" would not be more appropriate, given the objective of providing practical guidance on the way in which the existence or otherwise of rules of customary international law, and their content, are to be determined. The Special Rapporteur suggests that this be considered at second reading, in light of the nature of the texts then adopted.

13. It was also suggested that draft conclusion 1 ("Scope") is not, *stricto sensu*, a conclusion on the identification of customary international law, and that its content, which is of an introductory nature, could be taken up in the general commentary that the Special Rapporteur will propose to the Commission. The Special Rapporteur tends to agree with this suggestion, which is along the same lines as the Drafting Committee's 2015 decision under the topic "Protection of the environment in relation to armed conflict".[15] Such a change could be made either this year or on second reading.

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[13] A similar procedure was proposed by the Special Rapporteur on Responsibility of International Organizations in his seventh report (A/CN.4/610, para. 4 et seq. (27 March 2009)), and taken up by the Commission.

[14] Some of the contributions to the meeting in Bangi are to be published in 15 *Chinese Journal of International Law* (2016). See also S. Yee, "Report on the ILC Project on 'Identification of Customary International Law"', 14 *Chinese Journal of International Law* (2015) 375–398.

[15] The proposal of the Special Rapporteur on the topic "Protection of the environment in relation to armed conflict" to this effect was adopted by the Drafting Committee in 2015. See the statement of the Chairman of the Drafting Committee (30 July 2015), p. 2.

14. One delegation in the Sixth Committee suggested that the draft conclusions should be more detailed. As the Special Rapporteur indicated in the past, and as the ensuing discussions in the Commission have shown, the need to achieve a balance between making the draft conclusions clear and concise on the one hand, and comprehensive on the other, needs constantly to be borne in mind. Several draft conclusions proposed in the second and third reports were indeed expanded following the debates in plenary and in the Drafting Committee. Other important nuances, it is hoped, will be brought out in the draft commentaries. It is the aim of the Special Rapporteur that the latter will provide the necessary additional depth and detail, and that they will be read together with the draft conclusions as an indissoluble whole. Any further specific suggestions in this respect would be welcome.

15. A concern was voiced in the Sixth Committee that the reference in the draft conclusions to a wide array of potential types of evidence of customary international law might be taken to suggest that customary international law was easily created or inferred. While this concern is understandable, the reference to multiple forms of State practice and various manifestations of State behaviour through which acceptance as law (*opinio juris*) may be made known simply reflects the fact that States exercise their powers in various ways and do not confine themselves only to some types of acts. This does not imply that the existence of rules of customary international law is lightly to be assumed, particularly when in principle "those who participate in the formation of a custom are sovereign States who are the decision-makers, the law-makers within the community. Their recognition of the practice as law is in a very direct way the essential basis of customary law".[16] It is the intention of the Special Rapporteur that, in line with the draft conclusions provisionally adopted, the draft commentaries would make it clear that establishing the existence and content of a rule of customary international law entails a search for a practice that has gained such acceptance among States that it may be considered to be the expression of a legal right or obligation. The test must always be: is there a general practice that is accepted as law?

16. Several delegations suggested that the formation of customary international law should not be overlooked in the draft conclusions and commentaries, recalling that the topic was originally entitled "Formation and evidence of customary international law". The Special Rapporteur would concur, in particular as the identification of the existence and content of a rule of customary international law may well involve consideration of the processes by which it has developed. The draft conclusions indeed refer in places, explicitly or otherwise, to the formation of rules of customary international law, and it is intended that the draft commentaries will also do so. At the same time, the aim of the topic is to assist in the determination of the existence (or not) and content as of a particular time of rules of customary international law. The task that faces counsel, judges or arbitrators concerns identifying the law as it is, or was, at a particular time, as opposed to how the law developed over time or might develop in the future. As has previously been agreed, it is not the aim of the topic to explain the myriad of influences and processes involved in the development of rules of customary international law over time, especially given the desire is to keep such processes flexible, as they inherently are.

[16] H. Waldock, "General Course on Public International Law", 106 *Recueil des Cours* (1962) 49.

17. Closely connected is the reference by some delegations to the difficulty that often arises in identifying the precise moment when a critical mass of practice accompanied by acceptance as law (*opinio juris*) has accumulated, and a rule of customary international law has thus come into being. One delegation mentioned the similar challenge associated with an enquiry into the exact time when treaty parties might acquire a sense of being under a legal obligation extending also to non-parties. These comments reflect the fact that the creation of customary international law is not an event that occurs at a particular moment, but rather "emanates from an 'intensive dialectic process' between different actors of the international society".[17] But again, the draft conclusions seek to provide guidance as to whether, at a given moment, it may be said that such process had occurred.[18] Much depends upon the point in time at which evidence is considered.

18. Several delegations provided very helpful comments on the process of assessment of evidence for the two constituent elements, currently dealt with in draft conclusion 3. It is intended that these will be reflected in the commentary, which would seek to explain the reference in the draft conclusion to "overall context, the nature of the rule, and the particular circumstances in which the evidence in question is to be found". As suggested by some delegations, the commentaries would clarify, moreover, that the requirement for a separate inquiry for each of the two constituent elements of customary international law does not exclude the possibility that, in some cases, the same material may be used to ascertain both practice and acceptance as law (*opinio juris*).

19. A concern was raised that the reference in draft conclusion 4, paragraph 2, to the practice of international organizations as "also" creative or expressive of customary international law puts such practice on the same level as the practice of States, notwithstanding the inclusion of the words "[i]n certain cases". This, it was argued, does not find support in existing international law, where the practice of international organizations (with the exception of the European Union), while it may play an important indirect role, does not contribute directly to the formation, or expression, of customary international law. A suggestion was made in this connection to delete paragraph 2 and either to explain in the commentary the roles that international organizations do play, or deal with the matter in a separate draft conclusion. Others, however, supported the present text of paragraph 2, and some suggested that international organizations should not be treated in isolation (also providing some drafting proposals to that effect). It was also noted that at present the reference to international organizations is not entirely consistent throughout the draft conclusions as a whole, since in places the latter refer explicitly to State practice alone.

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[17] J.R. Crawford, "The Identification and Development of Customary International Law", Keynote Speech at the Spring Conference of the ILA British Branch, 23 May 2014 (citing P. Allott, 'Language, Method and the Nature of International Law" 45 *British Yearbook of International Law* (1971) 103, 129).

[18] See also K. Wolfke, *Custom in Present International Law*, 2nd revised edition (Martinus Nijhoff Publishers, 1993) 54 ("Writers are, in general, in agreement that the moment of formation of a custom — and hence the moment in which a customary rule begins to have binding effect — cannot be ascertained, since it is practically speaking intangible. We can ascertain only whether at a precise moment the custom exists, and at most, upon analysis of practice, make certain anticipations concerning the evolution of a particular custom").

20. The Special Rapporteur continues to consider that the practice of international (intergovernmental) organizations as such, in certain cases, may contribute to the creation, or expression, of customary international law. The relevance of such practice is difficult to deny in the case of the European Union or, in fact, in any case where member States may direct an international organization to execute on their behalf actions falling within their own competences. The relevance of practice by international organizations should not be controversial, moreover, if it is accepted that the practice of international organizations in their relations among themselves, at least, could give rise or attest to rules of customary international law binding in such relations.[19] At the same time, as several delegations have also emphasized, given that international organizations are not States, and vary greatly (not just in their powers, but also in their membership and functions), in each case their practice must be appraised with caution. This should be made clear in the commentary to the current paragraph 2. Alternatively, apart from the possible changes mentioned in paragraph 19 above, the language of paragraph 2 may be revisited, either now, or on second reading after States have had a chance to see the accompanying draft commentary. The Special Rapporteur would welcome the further views of members of the Commission on this.

21. A couple of delegations were concerned that the wording of draft conclusion 4, paragraph 3, dealing with the conduct of actors other than States and international organizations, was too strict, in that it does not adequately recognize the important contribution that such actors may make to international practice related to their work and the possible development of customary international law. Reference was made in this context to the International Committee of the Red Cross (ICRC) in particular. The Special Rapporteur would like to draw attention to the words "but may be relevant when assessing the practice [of States and international organizations]", found in paragraph 3, which acknowledge that although the conduct of "other actors" is not directly creative, or expressive, of customary international law, it may very well have an important (albeit indirect) role in the development and identification of customary international law. In fact, it was the work of ICRC and its significant contribution to the development of customary international

[19] This notion appears to be accepted in the 1986 *Vienna Convention on the Law of Treaties between States and International Organizations or Between International Organizations*, which refers in its preamble to the "codification and progressive development of the rules relating to treaties between States and international organizations or between international organizations", and in which it is affirmed (also in the preamble) that "rules of customary international law will continue to govern questions not regulated by the provisions of the present Convention"; see also art. 38 of the Convention. It may also be noteworthy that the European Bank for Reconstruction and Development's current Standard Terms and Conditions for loan, guarantee and other financing agreements recognize that the sources of public international law that may be applicable in the event of dispute between the Bank and a party to a financing agreement include, inter alia, "... forms of international custom, including the practice of states *and international financial institutions* of such generality, consistency and duration as to create legal obligations" (emphasis added): *European Bank for Reconstruction and Development, Standard Terms and Conditions (1 December 2012)*, Sect. 8.04(b)(vi)(C)).

humanitarian law (by stimulating or recording practice and acceptance as law (*opinio juris*) by States)[20] that to a large extent inspired the text of paragraph 3.

22. The revised references in the draft conclusions to inaction as a form of practice and/or evidence of acceptance as law (*opinio juris*), following the closer examination of the issue by the Commission in 2015, were widely supported. A large number of delegations underlined again that the relevance of inaction as evidence of acceptance as law (*opinio juris*) had to be assessed with caution: States are not to be expected to react to everything, and attributing legal significance to their inaction depended on the particular circumstances of each situation. Support was expressed in this connection for the elaboration of draft conclusion 10, paragraph 3 by the Drafting Committee in 2015, and it was suggested that the accompanying commentary further clarify the requirements for attributing probative value to inaction. The Special Rapporteur agrees, and will seek to make clear in the draft commentary not only that it is essential that a reaction to the relevant practice would have been called for, but also that where a State does not or cannot have been expected to know of a certain practice, or has not yet had a reasonable time to respond, its inaction cannot to be attributed to a belief on its part that such practice is mandated (or permitted) under customary international law.

23. One delegation was concerned that draft conclusion 7, paragraph 2 (which in its current form provides that where the practice of a particular State varies, the weight to be given to that practice may be reduced) might disadvantage States where the independence of the judiciary and the juxtaposition of government and parliament might lead to different views, or at least to different nuances being expressed. The Special Rapporteur would note in this connection that States do generally attempt to speak with one voice on matters of international affairs, and that the draft conclusion does not seek to take any position with respect to the internal order of any State. More specifically, and as the draft commentary would seek to make clear, the word 'may' in the draft conclusion indicates that an

[20] See also *Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ICTY Appeal Chambers (2 October 1995), para. 109 ("As is well known, ICRC has been very active in promoting the development, implementation and dissemination of international humanitarian law. From the angle that is of relevance to us, namely the emergence of customary rules on internal armed conflict, ICRC has made a remarkable contribution by appealing to the parties to armed conflicts to respect international humanitarian law. It is notable that, when confronted with non-international armed conflicts, ICRC has promoted the application by the contending parties of the basic principles of humanitarian law. In addition, whenever possible, it has endeavoured to persuade the conflicting parties to abide by the Geneva Conventions of 1949 or at least by their principal provisions. When the parties, or one of them, have refused to comply with the bulk of international humanitarian law, ICRC has stated that they should respect, as a minimum, common article 3. This shows that ICRC has promoted and facilitated the extension of general principles of humanitarian law to internal armed conflict. The practical results ICRC has thus achieved in inducing compliance with international humanitarian law ought therefore to be regarded as an element of actual international practice; this is an element that has been conspicuously instrumental in the emergence or crystallization of customary rules"); T. Meron, 'The Continuing Role of Custom in the Formation of International Humanitarian Law', 90 *American Journal of International Law* (1996) 238, 245, 247 ("The ICRC is of course neither a state nor an intergovernmental organization, but an association under Swiss civil law. Thus, it is not a direct participant in the making of international law, which under the prevailing theory of sources is still reserved to states, with some allowance for the role of intergovernmental organizations … [however, it] influences State practice and thus, indirectly, the development of customary law").

assessment of a State's practice as a whole needs to be approached with care. One example where such an approach is evident may be found in the *Fisheries Case*, where the International Court of Justice held with respect to the relevant practice that "too much importance need not be attached to the few uncertainties or contradictions, real or apparent ... They may be easily understood in the light of the variety of facts and conditions prevailing in the long period".[21] In any event, such assessment should take account of the constitutional position of the relevant State organs, including the question which of them has the final say in the relevant matter.[22]

24. An observation was made that while draft conclusion 12 stated correctly that resolutions cannot, in and of themselves, constitute customary international law, the same was true of treaties, yet the draft conclusion dealing with the latter (draft conclusion 11) did not contain such an express statement. The drafting of draft conclusion 11 reflects an understanding that the basic rule according to which a treaty cannot in principle create obligations for third parties is well understood; the guidance felt necessary to be provided in draft conclusion 11 rather has to do with how treaties may shed light on the existence and content of rules of customary international law.[23] The commentary would explain, however, that the words 'if it is established that' make it clear that ascertaining whether a conventional formulation does in fact correspond to an alleged rule of customary international law cannot be done just by looking at the text of the treaty; in each case the existence of the rule must be confirmed by practice (and acceptance as law (*opinio juris*)).

25. Several delegations stressed that great caution should be used when assessing the relevance and significance of resolutions of international organizations and intergovernmental conferences in the identification of customary international law. It was agreed that, as noted in the third report, only some resolutions may be evidence of existing or emerging law, depending on various factors which must be carefully assessed in each case. The Special Rapporteur intends that the commentary will explain further the cautious language of draft conclusion 12, and specify what factors are to be taken into account. It is also intended that, as suggested in the Sixth Committee, the particular relevance of the General Assembly as a forum of near universal participation would be highlighted in this context.

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[21] *Fisheries Case, Judgment of December 18th, 1951: I.C.J. Reports 1951*, p. 116, at p. 138.

[22] See, for example, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, p. 99, at p. 136, para. 83 (where the Court noted that "under Greek law" the view expressed by the Greek Special Supreme Court prevailed over that of the Hellenic Supreme Court).

[23] It should also be noted that the International Court of Justice remarked in the *North Sea Continental Shelf* cases that if "a very widespread and representative participation in the convention ... provided it included that of States whose interests were specially affected", is registered, that "might" suffice of itself to transform a conventional rule into a rule of customary international law (*North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 42, para. 73). In other words, a multilateral treaty might, in certain circumstances, "because of its own impact" (para. 70), give rise to a rule of customary international law. As has recently been written, however, "the Court was careful not to determine definitely whether the method was even a possible one ... In any event, widespread participation in a codification convention has never, in the jurisprudence of the Court, been sufficient on its own for the confirmation of a customary rule": P. Tomka, 'Custom and the International Court of Justice', 12 *The Law & Practice of International Courts and Tribunals* (2013) 195, 207.

26. Some delegations suggested that a separate conclusion, or at least a specific reference in the commentary accompanying draft conclusion 14 ('teachings'), should be devoted to the role of the Commission's output in the identification of customary international law. Such output, it was said, did not seem to equate to scholarly work given the Commission's status and relationship with States as a subsidiary organ of the General Assembly. The Special Rapporteur agrees that the Commission does hold a special place in the present context, and recalls that this was also highlighted by members of the Commission in the debate in 2015. It is intended that the draft commentary would recognize the particular value that may attach to a determination by the Commission affirming the existence and content of a rule of customary international law (or a conclusion by the Commission that no rule exists), and explain why this is so. Furthermore, the importance of the Commission's work as a catalyst for State practice and expressions of legal opinion is alluded to in other draft conclusions, in particular those dealing with forms of practice, forms of evidence of acceptance as law (*opinio juris*), and the potential relevance of treaties. As noted by one delegation, the Commission's work may also feed into resolutions of the General Assembly. The commentaries to the relevant draft conclusions would seek to capture these points.

27. The inclusion of a draft conclusion on the persistent objector rule was supported by almost all delegations who addressed the matter in the Sixth Committee, indicating widespread agreement that the rule does form part of the corpus of international law.[24] Some delegations, however, expressed concern that recognizing the rule in the draft conclusions may destabilize customary international law or be invoked as a means to avoid customary international law obligations. The Special Rapporteur intends, in this connection, that the commentary, like draft conclusion 15 itself, would emphasize the stringent requirements associated with the rule and, in particular, that once a rule of customary international law has come into being, an objection not voiced earlier will not avail a State wishing to exempt itself from its binding force. Several delegations suggested that the draft commentary should refer to the question of persistent objection vis-à-vis rules of *jus cogens*. However, the Commission decided at an early stage not to deal with *jus cogens* as part of the present topic, and has now taken it up as a separate topic.

[24] For illustration in State practice and the case law of international courts and tribunals see *Third report on identification of customary international law*, A/CN.4/682, paras. 86-87 and accompanying footnotes; J.A. Green, *The Persistent Objector Rule in International Law* (Oxford University Press, 2016), in general, but particularly chapter two (at 55: "there is ... more than enough evidence to support the existence of the persistent objector rule today. The state acceptance and usage of the rule, especially when taken alongside the increasingly notable judicial endorsement of it and its ubiquity in scholarship, confirms that the rule is indeed a secondary rule of the international legal system"). See also Wolfke, *supra* note 18, at 66 ("The argument that, in practice, such objections [by a persistent objector] are rarely upheld and the objectors finally join the general practice and the arising custom does not undermine the principle of persistent objector. On the contrary, it shows merely that for extra-legal reasons, the so-called "societal context", it is in practice difficult, if not impossible, for individual states to abstain *à la longue* from the general evolution of international law"); G.M. Danilenko, *Law-Making in the International Community* (Martinus Nijhoff Publishers, 1993) 112 ("Experience shows that community pressure often results in situations where objecting states are compelled to recognize new rules which have won broad support in the framework of the international community. However, the possibility of effective preservation of the persistent objector status should not be confused with the legally recognized right not to agree with new customary rules").

28. One delegation questioned the need for an objection to an emerging rule of customary international law to be repeated and maintained (including after the rule has come into being) in order to secure persistent objector status. It was suggested, instead, that once a State had made it clear that it did not wish to be bound by an emerging rule, it had no obligation to reiterate that stance time and again; the State would lose its status of persistent objector only when its subsequent practice or legal views explicitly expressed support for the new rule and deviated from its earlier position. While this approach does have its appeal, it seems to disregard the legal force that may sometimes attach to silence (when it amounts to acquiescence), and to downplay the importance of inaction in both the development and the identification of rules of customary international law. Nevertheless, there is no requirement that States constantly object: it is intended that the commentary will make clear that objection should be expected only as and when the circumstances are such that a restatement of the objection is to be expected (i.e. where silence or inaction may lead to the conclusion that the State has given up its objection).[25] As was also suggested, this requirement should be approached in a balanced and pragmatic manner.

29. Some delegations expressed concern that referring to rules of particular customary international law, which by definition apply only among a limited number of States, might be taken to encourage fragmentation of international law. While such concerns are understandable, it is undisputed that rules of particular customary international law exist (as is confirmed, inter alia, in the case law of the International Court of Justice).[26] Even if they are not all that frequently encountered in practice, rules of particular customary international law sometimes play a significant role in inter-State relations, accommodating differing interests and values peculiar to some States only. Guidance as to how such rules are to be identified (including the clarification that stricter criteria apply) may thus prove useful. The Special Rapporteur would like the commentaries to make clear, however, that it is not to be excluded that rules of particular customary international law may evolve over time into rules of general customary international law.[27]

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[25] See also *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984*, p. 246, at p. 305, para. 130; M. Bos, "The Identification of Custom in International Law", 25 *German Yearbook of International Law* (1982) 9, 37 ("it should be emphasized that silence may not always be taken to mean acquiescence: for States cannot be deemed to live under an obligation of permanent protest against anything not pleasing them. For legal consequences to ensue, there must be good reason to require some form of action"); I.C. MacGibbon, "The Scope of Acquiescence in International Law", 31 *British Yearbook of International Law* (1954) 143 ("Acquiescence thus takes the form of silence or absence of protest in circumstances which generally call for a positive reaction signifying an objection"). This is consistent with the approach adopted in draft conclusion 10, paragraph 3, dealing with inaction as a form of evidence of acceptance as law (*opinio juris*).

[26] See *Third report on identification of customary international law*, A/CN.4/682, para. 80.

[27] See also *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law – Report of the Study Group of the International Law Commission*, A/CN.4/L.682 (13 April 2006), para. 201 ("these regional influences appear significant precisely because they have lost their originally geographically limited character and have come to contribute to the development of universal international law"); R.Y. Jennings, 'Universal International Law in a Multicultural World', in M. Bos and I. Brownlie (eds.), *Liber Amicorum for Lord Wilberforce* (Oxford University Press, 1987) 41 ("[The universality of international law] is not to say, of course, that there is no room for regional variations, perhaps even in matters of principle … Every law, including the law within the sovereign State, readily accommodates such variations. Universality does not mean uniformity. It does mean, however,

III. Proposed amendments to the draft conclusions in light of comments received

30. In the light of suggestions made since the sixty-seventh session, the Special Rapporteur proposes that a limited number of minor modifications be made to the text of the draft conclusions provisionally adopted by the Drafting Committee in 2014 and 2015. As noted above, other possible changes may well be considered, either this year or upon second reading. For convenience, the suggested amendments to the draft conclusions are set out (and marked-up) in the annex to the present report.

31. In draft conclusion 3 ("*Assessment of evidence for the two elements*"), paragraph 2, it is suggested that the text be clarified and its context be emphasized by replacing the words "Each element is to be separately ascertained", which refer to the two constituent elements of customary international law, with "Each of the two elements is to be separately ascertained".

32. In draft conclusion 4 ("*Requirement of practice*"), paragraph 1, it is suggested that small amendments be made in order to indicate better not only whose practice is primarily relevant for the identification of customary international law, but also the role of such practice. This would provide clearer guidance, and better correspond to the title of the draft conclusion. Among the amendments suggested, replacing the words "formation, or expression" with the words "expressive, or creative" draws inspiration from the language of the International Court of Justice in the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* case, where the actual practice of States was referred to as "expressive, or creative, of customary rules".[28] It would also serve to focus the paragraph on the task of identification of a rule. The paragraph could thus read:

> "The requirement, as a constituent element of customary international law, of a general practice refers primarily to the practice of States as expressive, or creative, of rules of customary international law."

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that such a regional international law, however variant, is part of the system as a whole and not a separate system, and it ultimately derives its validity from the system as a whole"); B. Sepúlveda-Amor, "Comments on Fawcett and Obregón", in M.J. Aznar and M.E. Footer (eds.), *Select Proceedings of the European Society of International Law*, Fourth Volume (Hart Publishing, 2015) 39-43 ("Remarkably, some of the doctrines and rules that originated in this region [of Latin America] in the nineteenth and twentieth centuries were regarded in many quarters, at first, as extravagant and contrary to the laws of civilized nations. Ultimately, however, some of them came to be embraced as part and parcel of general international law. The *uti possidetis juris* principle is a paradigmatic example ..."); D. Pulkowski, 'Theoretical Premises of 'Regionalism and the Unity of International Law'', in M.J. Aznar and M.E. Footer (eds.), *Select Proceedings of the European Society of International Law*, Fourth Volume (Hart Publishing, 2015) 77, 84-85 ("regionalism does not affect legal unity in ways that are qualitatively different from other phenomena of modern international lawmaking. Regional law is a sub-variant of particular international law [ranging from plurilateral treaties with limited adherence, to quasi-universal multilateral conventions], and as such is neither more nor less prone to creating disorder in the international system than other forms of particularism").

[28] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, p. 18, at p. 46, para. 43 ("... it should be borne in mind that, as the Court itself made clear in that [1969] Judgment, it was engaged in an analysis of the concepts and principles which in its view underlay the actual practice of States which is expressive, or creative, of customary rules").

33. If draft conclusion 4, paragraph 1, is amended in this way, corresponding changes would be made to draft conclusion 4, paragraph 2, and draft conclusion 4, paragraph 3.

34. In draft conclusion 6 ("*Forms of practice*"), paragraph 2, it is suggested that the words "conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference" be deleted. While such conduct may sometimes be relevant as State practice, in practice it is more often useful as evidence of acceptance as law (*opinio juris*) or lack thereof, and draft conclusion 6, paragraph 2, in any case does not give an exhaustive list of forms of practice. The reference to "conduct in connection with resolutions" would of course remain in draft conclusion 10, paragraph 2, which lists possible forms of evidence of acceptance as law (*opinio juris*).

35. In draft conclusion 9 ("*Requirement of acceptance as law (*opinio juris*)*"), paragraph 1, it is suggested that the words "undertaken with" be replaced by the words "accompanied by". The words "undertaken with" could more easily be read to encompass the legal opinion both of States carrying out the relevant practice and those in a position to react to it; they were also employed recently by the International Court of Justice, in its 2012 judgment in the *Jurisdictional Immunities of the State* case.[29]

36. In draft conclusion 12 ("*Resolutions of international organizations and intergovernmental conferences*"), paragraph 1, it is suggested to replace the word "cannot" by the words "does not", since this would better reflect the factual rather than normative nature of the statement, and is better drafting.

37. In draft conclusion 12, paragraph 2, it is suggested, first, that the word "establishing" be replaced with the word "determining", for greater consistency within the draft conclusions as a whole (the word "determine" is used in draft conclusions 1, 2, 13, 14, and 16 in connection with rules of customary international law). It is also suggested that the words "or contribute to its development", be deleted to better focus the draft conclusion on the identification of customary international law; the potential contribution of resolutions of international organizations and intergovernmental conferences to the development of the law could be covered in the commentary.

IV. Making the evidence of customary international law more readily available

38. The practical challenges of access to evidence in order to ascertain the practice of States and their *opinio juris* have long been recognized. Such difficulties, which of course are closely linked to the nature of customary international law as *lex non*

[29] See *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, p. 99, at p. 123, para. 55 ("... the point is that the grant of immunity in such a case is not accompanied by the requisite *opinio juris* and therefore sheds no light upon the issue currently under consideration by the Court"), and p. 135, para. 77 ("That practice is accompanied by *opinio juris*, as demonstrated by the positions taken by States and the jurisprudence of a number of national courts which have made clear that they considered that customary international law required immunity".)

scripta,[30] were also acknowledged by the Committee on the Progressive Development of International Law and its Codification ('the Committee of Seventeen') in 1947.[31] The Committee therefore recommended in its report to the General Assembly that "the ILC consider ways and means for making the evidences of customary international law more readily available",[32] and this led to the inclusion of article 24 in the Statute of the Commission (1947), within the section entitled "Codification of international law". Article 24 stipulates that —

> "The Commission shall consider ways and means for making the evidence of customary international law more readily available, such as the collection and publication of documents concerning State practice and of the decisions of national and international courts on questions of international law, and shall make a report to the General Assembly on this matter".[33]

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[30] See also S. Rosenne, *Practice and Methods of International Law* (Oceana Publications, 1984) 56 ("The evidence of customary law [given that it is essentially based on practice] is therefore scattered, elusive, and on the whole unsystematic"); R.M. Mersky, J. Pratter, 'A Comment on the Ways and Means of Researching Customary International Law a Half-Century after the International Law Commission's Work', 24 *International Journal of Legal Information* (1996) 302, 304.

[31] Sir Dalip Singh, Chairman of the Committee, explained that "the evidence of customary international law was not easily available in contradistinction to evidence of scientific international law which was always laid down in books" (A/AC.10/SR.27 (20 June 1947), p. 11). It was observed at about that time, in connection with the identification of customary international law, that "[n]othing could be worse than the current repetition of quotations from the very limited repertoire of diplomatic notes which are taken over from one textbook into another and only rarely supplemented by casual personal excursions of writers into the unknown wilderness of state papers": G. Schwarzenberger, "The Inductive Approach to International Law", 60 *Harvard Law Review* (1947) 539, 564.

[32] *Report of the Committee on the Progressive Development of International Law and its Codification on the Methods for Encouraging the Progressive Development of International Law and its Eventual Codification*, A/AC.10/51 (17 June 1947), para. 18 ("In connection with the development of customary international law, as well as with the development of the law through the judicial process, the Committee desired to recommend that the ILC consider ways and means for making the evidences of customary international law more readily available by the compilation of digests of State practice, and by the collection and publication of the decisions of national and international courts on international law question"). A memorandum submitted to the Committee by its secretariat suggested that "[w]hile customary international law develops as a result of State practice and its growth is not dependent upon conscious international efforts, the United Nations can stimulate its development through taking steps to render more accessible the evidence of the practice of States in the form of digests of international law … [a useful approach for ascertaining and compiling such digests] might be the consideration of methods whereby the materials containing such evidences can be made more readily available" (A/AC.10/7 (7 May 1947), pp. 5-6 (citation omitted)).

[33] The task assigned to the Commission under article 24 of its Statute was "distinct from the other functions of the Commission, namely, the progressive development and the codification of international law … [it] relates exclusively to evidence of customary international law, yet it is concerned not merely with any particular topic but with the whole range of customary international law. The task, specifically stated, is to explore ways and means of remedying the present unsatisfactory state of documentation. This is made clearer by the French text, which speaks of "documentation", than by the English text, which employs the word "evidence": *Ways and Means of Making the Evidence of Customary International Law more Readily Available: Preparatory work within the purview of article 24 of the Statute of the International Law Commission - Memorandum submitted by the Secretary-General:* A/CN.4/6 (1949), p. 5.

39. The question of the implementation of article 24 was among the first items on the Commission's agenda.[34] In this connection the Commission had before it at its first session a memorandum submitted by the United Nations Secretary-General entitled "Ways and Means of Making the Evidence of Customary International Law more Readily Available: Preparatory work within the purview of article 24 of the Statute of the International Law Commission".[35] The memorandum comprised three parts: (a) a short introduction on "The problem of making the evidence of customary international law more readily available"; (b) an extensive survey of "The existing state of the Evidence of Customary International Law and suggestions hitherto made for its improvement"; and (c) an evaluation of the state of the evidence of customary international law at that time and possible "ways and means" to improve it.[36] Following a debate on the memorandum and the topic more broadly, the Commission invited one of its members, Manley O. Hudson, to prepare a working paper on the subject for consideration during the Commission's second session.[37]

40. On the basis of Hudson's working paper,[38] the Commission observed in its 1950 report to the General Assembly that "[e]vidence of State practice is to be sought in a variety of materials", but considered it impractical to enumerate "all the numerous types of materials which reveal State practice on each of the many problems of international relations".[39] Instead it found it useful to list and survey "[w]ithout any intended exclusion, certain rubrics", or types, of evidence of customary international law: texts of international instruments; decisions of international courts; decisions of national courts; national legislation; diplomatic correspondence; opinions of national legal advisers; and practice of international organizations.[40]

41. As for the availability of such evidence, the Commission suggested that this "may be considered in three aspects. First, availability for meeting the needs of particular groups of persons [these being private individuals engaged in the

[34] *Yearbook of the International Law Commission 1949*, vol. I, pp. 283-284, paras. 35-37. See also, more generally, H.W. Briggs, *The International Law Commission* (Cornell University Press, 1965) 203-206.

[35] A/CN.4/6 and Corr. 1. The Commission also had before it a working paper prepared by the Secretariat based on the memorandum (A/CN.4/W.9).

[36] The memorandum was said to be "the most complete and usable biographical manual which has appeared in this field ... admirably accomplishes its immediate purpose in providing full data and a sound and progressive program for the work of the International Law Commission and the General Assembly": L. Preuss, '[Review:] Ways and Means of Making the Evidence of Customary International Law more Readily Available. Memorandum submitted by the Secretary-General (A/CN.4/6)', 43 *American Journal of International Law* (1949) 834, 835. See also Mersky and Pratter, *supra* note 30, at 308 ("This is an impressive survey of the documentation of international law relevant to custom. There is not room here to go into the details of its content. It is enough to say that this document can still today be fully recommended as a resource for law librarians and other researchers").

[37] Commission members, with one exception, were very appreciative of the memorandum: see *Yearbook of the International Law Commission 1949*, vol. I, pp. 228-235. The decision by the Commission reads: "It was decided that no Rapporteur should be appointed to deal with the question of ways and means for making customary international law more readily available, but that a member of the Commission should prepare a working paper on that subject to be submitted to the second session of the International Law Commission" (at p. 235).

[38] A/CN.4/16 and A/CN.4/16/add.1.

[39] *Yearbook of the International Law Commission 1950*, vol. II, p. 368, para. 31.

[40] Ibid., at pp. 368-372, paras. 32-78.

exploration of international law, government and international officials]. Second, the extent to which materials already published are available throughout the world. Third, the extent to which materials not yet published may be made available throughout the world."[41] In this connection it was noted, inter alia, that extensive collections of published materials "are to be found only in great libraries of international law" that "[u]nfortunately ... are few and far between"; and that while "it is extremely difficult to estimate the present availability of many of the principal collections of evidence of customary international law, which have been published ... [i]n many instances, stocks probably do not exist to be drawn upon for meeting present or future demands".[42]

42. Against this background, the Commission then suggested "specific ways and means" for making the evidence of customary international law more readily available. These included: (a) distribution, as wide as possible and for a price as low as possible, of publications relating to international law issued by organs of the United Nations, and prompt publication of the texts of international instruments registered with, or filed and recorded by the Secretariat; (b) authorization of the Secretariat, in so far as has not yet been done, to prepare and distribute widely various publications containing legal materials from the various States and covering their practice (and the United Nations'), reporting international arbitral awards and outlining significant developments; (c) publication of occasional digests of the reports of the International Court of Justice; (d) the General Assembly calling to the attention of Governments the desirability of their publishing digests of their diplomatic correspondence and other materials relating to international law; and (e) consideration by the General Assembly to the desirability of an international convention concerning the general exchange of official publications relating to international law and international relations.[43]

43. Most of these recommendations have been acted upon,[44] giving rise to some important documentation frequently consulted by international lawyers. Publication of State practice (and of other evidence of such practice, as may be found in scholarly writings, documents stemming from international organizations, and decisions of international courts and tribunals) has greatly expanded, in part also thanks to "manifestations of zeal" of private national or international institutes.[45] The growing intensity of international relations has also made the practice and positions of States better known; and powerful new means to collect, preserve and

[41] Ibid., at p. 327, para. 80.

[42] Ibid., at p. 372, paras. 82-83.

[43] Ibid., at pp. 373-374, paras. 90-94.

[44] See also United Nations General Assembly resolution 487(V) of 12 December 1950 (United Nations Official Records, 5th Session, Supplement. No. 20, p. 77), inviting the Secretary-General to consider and report upon some of the Commission's recommendations; Y.-L. Liang, "The Second Session of the International Law Commission: Review of its work by the General Assembly", 45 *American Journal of International Law* (1951) 509, 510-514.

[45] The Commission had observed in 1950 that "[r]esults of the fruitful activities of non-official scientific bodies have appeared in the numerous reviews, and recent years have seen the launching of yearbooks or journals of international law in a number of countries. Despite these manifestations of zeal, it seems doubtful that many national or international institutes exist which may be relied upon for the sustained effort involved in the publication of useful compendiums of the evidence of customary international law. Few of them can undertake and continue a long-range programme of solid work; their personnel changes rapidly, their interest is easily deflected, and their funds are seldom adequate": *Yearbook of the International Law Commission 1950*, vol. II, p. 373, para. 89. But the position is very different today.

disseminate data have mitigated in the digital era many of the difficulties of accessing and collating published information that were foreseen in 1949/1950.[46]

44. The work of the Commission has itself made, and continues to make, the evidence of customary international law more readily available. As has been observed, "[t]oday, the process of codification furnishes an easy and convenient way of discovering the actual practice of States" given that "[t]he observations of governments on drafts elaborated by the International Law Commission, the discussions in the Sixth Committee of the General Assembly, the statements of representatives of States in plenipotentiary codification conferences constitute a sort of public enquiry about the practice of States and about their views as to the rules which are followed or ought to be followed on a certain subject; this is an evidence 'free of the ambiguities and inconsistencies characteristic of the patchwork of evidence of State practice'".[47] The regular publication by the United Nations of information supplied by Governments in response to requests by the Commission is important.[48]

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[46] See also T. Treves, 'Customary International Law', in *Max Planck Encyclopedia of Public International Law* (2006), para. 80 ("Important changes in the availability of manifestations of international practice have been brought about in recent times by electronic means of knowledge now widely available. Such means have made it possible for a very high number of States to make their practice accessible, remedying, at least as far as recent practice is concerned, the lack of balance of printed collections. They have also, admittedly only in part, made less acute the unfavourable position of those (government officials or scholars) who do not have access to the relatively few large and well organized libraries where the printed materials can be accessed. Lastly, electronic means have made practice available almost at the time the manifestations concerned come into being, thus eliminating the information gap existing between those States that have at their disposal well organized foreign services and other States, as well as most scholars").

[47] E. Jiménez de Aréchaga, 'International Law in the Past Third of a Century', 159 *Recueil des Cours* (1978) 26 (quoting R.R. Baxter, 'Treaties and Custom', 129 *Recueil des Cours* (1970) 36). See also Preuss, *supra* note 36, at 835 (suggesting at the time that given the lack of adequate documentation of much State practice, "[t]he development of a veritable *corpus juris gentium* is possible only under the guidance and direction of some such central agency as the International Law Commission, acting with the full cooperation of governments").

[48] See also H.W. Briggs, 'Official Interest in the Work of the International Law Commission: Replies of Governments to Requests for Information or Comment', 48 *American Journal of International Law* (1954) 603, 605, 612 (referring to a document submitted by the United States of America in response to the Commission's work on the law of treaties when remarking that "[i]t seems unfortunate that the document has not yet been published by the United States or issued as a United Nations document", and adding more generally with respect to replies from Governments to the Commission's requests for information that "[i]t is unfortunate for the professional student of international law that these materials are mostly issued only in impermanent mimeographed form and are of limited availability. These factors underline the pressing need for a United Nations Juridical Yearbook in which these and comparable materials might be printed so as to form a readily available and permanent record of contemporary developments in international law"). Comments by Governments on the Commission's draft texts have sometimes been published by individual Governments or privately (for example, 'Comments by Certain Governments on the Provisional Articles Concerning the Regime of the High Seas and the Draft Articles on the Regime of the Territorial Sea Adopted by the United Nations International Law Commission at its Seventh Session in 1955', 50 *American Journal of International Law* (1956) 992-1049), but this has not been done comprehensively or consistently. The Secretariat has now begun publishing on the Commission's website, for each topic under consideration, not only comments and observations received on first-reading products of the Commission, but also other responses from Governments received following requests form the Commission during the deliberations on the topic.

45. At the same time, the expanded number of States (and international organizations), the far greater volume of international intercourse, and the multiple formats of evidence now in existence, pose significant challenges to a thorough enquiry into the practice and *opinio juris* of States. The sheer quantity of available material is daunting: even thirty years ago, one author was of the view that "one difficulty now is the embarrassingly rich and varied range of evidences, in these days of digests and national practices, and almost daily spat of resolutions, recommendations, and assertions from some more or less authoritative body or other".[49] Such challenges are compounded by the absence of a common classification system to compare and contrast the practice of States and others.[50]

46. In addition, despite the great mass of materials that is now at hand, coverage of State practice remains limited given that many official documents and other indications of governmental action are still unpublished and thus unavailable.[51] This may sometimes reflect a political choice,[52] but more often derives from the simple fact that publishing State practice systematically "requires considerable resources, and relatively few States have succeeded in sustaining publication of comprehensive material over an extended period".[53]

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[49] R.Y. Jennings, "The Identification of International Law", in B. Cheng (ed.), *International Law: Teaching and Practice* (Stevens & Sons, 1982) 3, 5 (referring in particular to the ascertainment of *opinio juris*). See also B. Graefrath, "The International Law Commission Tomorrow: Improving Its Organization and Methods of Work", 85 *American Journal of International Law* (1991) 595, 606 ("Today, State practice and legal activities have become so extensive and technical, and information is so voluminous and scattered"); Mersky and Pratter, *supra* note 30, at 304 ("The reality is that the recorded evidence of state practice is scattered throughout a literature as vast as international law itself"); R.F. Gaebler, A.A. Shea (eds.), *Sources of State Practice in International Law*, Second Revised Edition (Brill Nijhoff, 2014) 4 ("comprehensiveness of coverage seems to be an ever more elusive goal").

[50] The exception of the model plan for the classification of documents concerning State practice in the field of public international law, adopted by the Committee of Ministers of the Council of Europe in 1968 (Resolution (68) 17) and amended in 1997 (Recommendation No. R (97) 11), bears mention in this context: See L. Caflisch, "The CAHDI Model Plan for the Classification of Documents Concerning State Practice in the Field of Public International Law", in Council of Europe (ed.), *The CAHDI Contribution to the Development of Public International Law: Achievements and Future Challenges* (Brill Nijhoff, 2016) 12-18.

[51] See also M. Akehurst, "Custom as a Source of International Law", *British Yearbook of International Law*, 47 (1977) 1, 13 ("Much of the evidence of State practice is hidden in unpublished archives. Consequently one can never prove a rule of customary law in an absolute manner but only in a relative manner – one can only prove that the majority of the evidence *available* supports the alleged rule").

[52] See also Treves, *supra* note 46, at para. 79 ("Reluctance to make available manifestations of practice by a number of secretive States, both large and small, and selectivity as to the documents made available, reflect a political choice between the desire to avoid criticism and to make it easier to contradict previous practice, on the one hand, and the desire to exercise leadership and influence the customary process, on the other").

[53] M. Wood, O. Sender, "State Practice", in *Max Planck Encyclopedia of Public International Law* (2014), para. 30. See also L. Ferrari Bravo, "Méthodes de recherche de la coutume internationale dans la pratique des Etats", 192 *Recueil des Cours* (1985) 310; S. Sur, "Sources du droit international – La coutume", 118 *Juris Classeur du Droit international* (fasc. 13) (1989), para. 57. But see Treves, *supra* note 46, at para. 78 ("It has been observed that the collections of State practice give an unbalanced view, as they concern the practice of the relatively small group of the main powers. While there is some truth in this observation, it must also be stressed that the main powers engage in relations with most other States, so that the practice of almost all States is, at least in part, reflected in these collections. Moreover, in recent times a number of collections and reviews of practice of smaller and third world States have begun to appear").

47. As has been written,

> "For a legal system so heavily dependent on customary international law, and thus on State practice as evidence of that law, improvements in ways and means of making that practice more widely available are necessary if the rule of law in international affairs is to prosper. The International Law Commission fully recognized the importance of State practice being widely available, and its Report [in 1950] did much to prompt action towards that end. Two developments, however, now threaten the full attainment of the objectives set in 1950 by the Commission: first, the enormous proliferation of the available material on the many aspects of international law and relations, and second the rising costs associated with its accumulation, storage, and distribution. With the added impact in recent years of revolutionary developments in global information technology, the subject covered by the Commission's 1950 report might repay renewed attention."[54]

48. For the Commission to consider once more ways and means for making the evidence of customary international law more readily available, after over sixty-five years and taking into account the significant changes that have occurred in this context since 1949/1950, may indeed prove useful; it could well assist those attempting to identify the existence and content of rules of customary international law. Several States speaking at the Sixth Committee in 2015 have already voiced their support for such an undertaking.

49. The Special Rapporteur would welcome the thoughts of members of the Commission on whether, and if so how, the matter should be revisited. In any event, as an initial step, the Special Rapporteur suggests that the Secretariat be requested to provide an account of the evidence currently available by updating the "General survey of compilations and digests of evidence of customary international law" that formed part of its 1949 memorandum, including, if appropriate, its recommendations.[55]

V. Future programme of work

50. It is proposed that the Commission's final outcome on the present topic could consist of three components: a set of conclusions, with commentaries; a further review of ways and means for making the evidence of customary international law more readily available; and a bibliography.

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[54] A. Watts, *The International Law Commission 1949-1998*, Vol. III (Oxford University Press, 1999) 2106. Briggs, too, has suggested that "[a]s the French version of Article 24 indicates, the International Law Commission is not limited to making a single report in this field": Briggs, *supra* note 34, at 206.

[55] It probably remains true, that, as in 1950 "[t]he part of the Commission must ... inevitably be limited to direction. The actual work [of making the evidence of customary international law more readily available] must be carried out by Governments, the Secretariat and individuals, either independently or in combination. And, without the co-operation of Governments, at least to the extent of opening their archives, relatively little can be achieved": C. Parry, "[Review:] Ways and Means of Making the Evidence of Customary International Law more Readily Available: Preparatory Work within the purview of article 24 of the Statute of the International Law Commission (Memorandum submitted by the Secretary-General)", 3 *International Law Quarterly* (1950) 462, 463.

51. If the Commission is able to complete the first reading of the draft conclusions, with commentaries, at its sixty-eighth session (2016), a second reading could take place in 2018. Following the sixty-eighth session, States (and others, including international organizations) would have adequate time to consider and comment on the first reading draft. States and international organizations should be invited to send to the Commission written comments on the draft conclusions and commentaries by 31 January 2018, at the latest. It is hoped that States will also offer initial observations during the Sixth Committee debate in 2016.

52. The question of ways and means for making the evidence of customary international law more readily available could continue to be considered in the period between the end of the Commission's sixty-eighth session and its session in 2018, with a view to refining the output on this matter. This could be done in the light of a Secretariat memorandum as proposed at paragraph 49 above, as well as suggestions from States, interested international organizations, non-governmental organizations, and academic institutions.

53. The Special Rapporteur is preparing a draft bibliography on the topic, which will initially be circulated to Commission members informally at the sixty-eighth session. It is proposed that, amended in the light of any suggestions that members may make, the draft bibliography will be circulated as an annex to the present report. It will then be revised by 2018 to ensure that it is up-to-date, representative, and user-friendly. This will be done in the light of suggestions from members of the Commission, States, international organizations, and academic and other institutions.

Annex

Proposed amendments to the draft conclusions

Words suggested for deletion are struck through; suggested additions are in bold.

Draft conclusion 3
Assessment of evidence for the two elements

[...]

2. Each **of the two** elements is to be separately ascertained. This requires an assessment of evidence for each element.

Draft conclusion 4
Requirement of practice

1. The requirement, as a constituent element of customary international law, of a general practice **refers** ~~means that it is~~ primarily **to** the practice of States **as expressive, or creative,** ~~that contributes to the formation, or expression,~~ of rules of customary international law.

2. In certain cases, the practice of international organizations also contributes to the ~~formation, or~~ expression, **or creation,** of rules of customary international law.

3. Conduct of other actors is not practice that contributes to the ~~formation, or~~ expression, **or creation,** of rules of customary international law, but may be relevant when assessing the practice referred to in paragraphs 1 and 2.

Draft conclusion 6
Forms of practice

[...]

2. Forms of State practice include, but are not limited to: diplomatic acts and correspondence; ~~conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference;~~ conduct in connection with treaties; executive conduct, including operational conduct "on the ground"; legislative and administrative acts; and decisions of national courts.

[...]

Draft conclusion 9
Requirement of acceptance as law (opinio juris)

1. The requirement, as a constituent element of customary international law, that the general practice be accepted as law (*opinio juris*) means that the practice in question must be ~~undertaken with~~ **accompanied by** a sense of legal right or obligation.

[...]

Draft conclusion 12
Resolutions of international organizations and intergovernmental conferences

1. A resolution adopted by an international organization or at an intergovernmental conference ~~cannot~~ **does not**, of itself, create a rule of customary international law.

2. A resolution adopted by an international organization or at an intergovernmental conference may provide evidence for ~~establishing~~ **determining** the existence and content of a rule of customary international law~~, or contribute to its development~~.

[...]

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Fourth report on identification of customary international law

by Michael Wood, Special Rapporteur

Addendum

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Annex II

Identification of customary international law: bibliography

The subject of identification of customary international law is one on which a great deal has been written, and the present bibliography does not seek to be exhaustive.

Part A lists writings dealing with identification of customary international law in general, including textbooks. Part B contains studies on particular aspects of the identification of customary international law, which correspond in part to issues dealt with by some of the draft conclusions on the identification of customary international law. Part C is dedicated to studies relevant to the identification of customary international law in different fields.

The Special Rapporteur would be grateful for suggestions of any additional references, which could be included in an updated bibliography to be produced at the time of the second reading of the draft conclusions and accompanying commentaries.

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